ALEXANDER L. STEVAS
CLERK

No. 80-1365

In The

Supreme Court of the United States

October Term, 1980

STATE OF CONNECTICUT, PETITIONER

vs.

MOHEGAN TRIBE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

CARL R. AJELLO
Attorney General
FRANCIS J. MAC GREGOR
GERARD J. DOWLING
Assistant Attorneys General
90 Brainard Road
Hartford, Connecticut 06114
(203) 566-7070
Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Argument	2
I. Congressional History Indicates Legislative Intention to Confine The Whole Acts to Indian Country	2
II. Except for the Act of 1790, Congress Never Intended the Alienation of Land Section to Apply to States Having The Right of Preemption	3
III. The Constitutional Argument of Amicus is Not Well Taken	4

TABLE OF AUTHORITIES

Cases:	Page
National League of Cities v. *Usery*, 426 U.S. 833 (1976)	5
Parden v. *Terminal Railway*, 377 U.S. 186 (1964)	5
United States Constitution:	
Art. I, Sec. 8, Clause 3 (Commerce Clause)	5
United States Statutes:	
Act of July 22, 1790, Ch. 33, Sec. 4, 1 Stat. 138	3
Act of March 1, 1793, Ch. 19, Sec. 8, 1 Stat. 329	3
Act of March 1, 1793, Ch. 19, Sec. 9, 1 Stat. 329	4
Congressional Reports:	
House Report No. 474, 23rd Congress, 1st Session, Vol. 263	2,4

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REASON FOR FILING REPLY

Pursuant to Rule 22(5) of the United States Supreme Court Rules, Petitioner respectfully files this Reply Brief. The Rules would indicate that the Reply Brief should answer the brief of a party, but, because Respondent's Brief was so vague and failed to address the issues raised, it would have served no purpose to answer it. However, the Solicitor General, as Amicus, has addressed some issues already raised plus a new one. It would be manifestly unjust to Petitioner not to allow it to address these arguments.

ARGUMENT

I

CONGRESSIONAL HISTORY INDICATES LEGISLATIVE INTENTION TO CONFINE THE WHOLE ACT TO INDIAN COUNTRY.

Amicus argues that nothing in the Acts suggest they were inapplicable to lands in the original thirteen states, land that lay outside Indian Country. (Amicus Brief, page 14).

Petitioner has pointed out in its Brief that the Act, read as a whole, suggests otherwise. The rather sketchy history of the various Acts also suggests that Congress intended these Acts to apply only in Indian Country.

For example, Representative Everett, reporting for the Committee on Indian Affairs, on May 20, 1834, discussed three bills before that Committee, one of these bills was the regulation of trade and intercourse.

In the report he stated "The Indian Country to which the bills reportedly refer...."[1], an apparently all inclusive statement. Representative Everett does not say "The Indian Country to which some sections of these bills reportedly refer...," nor does he use any other language indicating any intention by Congress to apply certain provisions of the Act outside of Indian Country. Mr. Everett, an orator of note, and certainly a man with considerable knowledge of the English language, must be presumed to have intended what he said.

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[1]House Report No. 474, 23rd Congress, 1st Session, Vol. 263, Page 1.

II

EXCEPT FOR THE ACT OF 1790, CONGRESS NEVER INTENDED THE ALIENATION OF LAND SECTION TO APPLY TO STATES HAVING THE RIGHT OF PREEMPTION.

In Section 4 of the Act of 1790, Congress specifically excluded sales "to any state, whether having the right to preemption to such lands or not...," and it is an undisputed fact that only the thirteen original states had rights of preemption in Indian land.

In the Alienation of Land Sections from 1793 on, this language was specifically deleted, and instead, Congress inserted the following proviso:

> "Provided nevertheless, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty."[2]

When Congress makes such a radical change in language such as this, it must be presumed that something very different was intended.

Unfortunately, Petitioner can find no legislative history for this change. However, the most reasonable explanation is that Congress, after 1793, only meant to apply this proviso in Indian Country. The elimination of the language concerning preemption indicates this. Also the presence of commissioners suggests its application only in Indian Country because the commis-

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[2]Act of 1793, Ch. 19, 1 Stat. 329.

sioners chosen to make treaties were either Indian superintendents, territorial governors or generals on the frontier, all persons who were in Indian Country. Petitioner can find no treaty ever made between the United States and an Indian tribe outside Indian Country as that term was defined in the Northwest Ordinance under the Articles of Confederation or in the Indian Trade and Intercourse Acts.

The Court of Appeals fell into the same error in its example to bolster its argument that some sections of the Act were confined to Indian Country and some were not. The Court picked as an example of universal, geographical application Section 9 of the 1793 Act. This Section empowered the President to appoint temporary agents to reside among the Indians. No agent, temporary or otherwise, ever resided with Indian tribes outside of Indian Country. In fact, no Indian department ever lay territorily outside of Indian Country.

If one looks at the organization of the Indian Department in 1802, 1818 or 1834 (See House Report No. 474, pages 42 through 48), it is obvious no superintendent, agent or subagent, was ever stationed outside Indian Country. Because of this, the analysis of the Court of Appeals loses much credibility.

III

THE CONSTITUTIONAL ARGUMENT OF AMICUS IS NOT WELL TAKEN.

For the first time in this civil action, Amicus has raised the Constitutional question, stating that the Respondent might prevail on a Constitutional question, and, therefore, this Petitioner is premature (Amicus Brief, pages 4 through 7).

Petitioner has found no case which has ever held that state transactions with Indians were ever unconstitutional nor can it find anything in the literature to support that argument of Amicus.

The fact that Congress has plenary power under the Commerce Clause does not mean the states are constitutionally excluded,[3] and this is particularly true where Congress chooses not to act.

Respectfully submitted,

by: /s/Francis J. MacGregor
Francis J. McGregor
Assistant Attorney General

CERTIFICATION

This is to certify that on the 21st day of May, 1981, a copy of Petitioner's Reply Brief was mailed to all counsel of record and Amicus.

/s/Francis J. McGregor
Francis J. MacGregor
Assistant Attorney General
90 Brainard Road
Hartford, CT 06114
Tel: (203) 566-7070

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[3]See *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and *Parden* v. *Terminal Railway*, 377 U.S. 186 (1964).